

Marquette University Law School Marquette Law Scholarly Commons

Faculty Publications

Faculty Scholarship

1-1-1996

Peace Between the Sexes: Law and Gender in Kramer vs. Kramer

David Ray Papke

Marquette University Law School, david.papke@marquette.edu

Follow this and additional works at: <http://scholarship.law.marquette.edu/facpub>



Part of the [Law Commons](#)

Publication Information

David Ray Papke, Peace Between the Sexes: Law and Gender in Kramer vs. Kramer, 30 U.S.F. L. Rev. 1199 (1996)

Repository Citation

Papke, David Ray, "Peace Between the Sexes: Law and Gender in Kramer vs. Kramer" (1996). *Faculty Publications*. Paper 480.
<http://scholarship.law.marquette.edu/facpub/480>

This Article is brought to you for free and open access by the Faculty Scholarship at Marquette Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

Peace Between the Sexes: Law and Gender in *Kramer vs. Kramer*

By DAVID RAY PAPKE*

WHEN *KRAMER VS. KRAMER* opened during the final weeks of 1979, the movie became, in the language of the cinematic box office, "celluloid dynamite," a "smash hit," and a "blockbuster."¹ Although produced for a relatively modest \$13 million, *Kramer vs. Kramer* earned \$16.5 million during its first two weeks of release.² Theaters in New York City and elsewhere added 1:00 a.m. screenings to accommodate the demand.³ New York and Los Angeles screenwriters showered the movie with awards, and in the spring of 1980, *Kramer vs. Kramer* won a basket of Academy Awards, including those for Best Actor, Best Supporting Actress, Best Screenplay, Best Director and last but not least, Best Picture.

Many factors explain this tremendous popular and commercial success. The movie's stars, Dustin Hoffman and Meryl Streep, had emerged as two of Hollywood's most interesting and talented actors. *Kramer vs. Kramer*'s director, Robert Benton, and producer, Stanley Jaffe, were experts at the tricks and delights of the popular film. The movie included a dozen scenes worthy of a tissue or two and also an adorable child, played superbly by Justin Henry. Most generally, in the center of an era prepared to scrutinize traditional male and female roles, the movie offered a powerful cinematic commentary on gender.

The very title of the movie, *Kramer vs. Kramer*, suggests that gender lines are drawn. Eschewing the "v." that rolls off the lips of law professors and their students, the movie speaks of "vs."—as in versus, against one another, in contrast with one another. On one side is Ted Kramer, a Manhattan art director so consumed by the challenges of Madison Avenue that

* Professor of Law & the Liberal Arts, Indiana University School of Law, Indianapolis. Ph.D., University of Michigan, 1984; J.D., Yale Law School, 1973; A.B., Harvard College, 1969. One of the experiences I enjoyed most in twelve years in academics was viewing and critiquing *Kramer vs. Kramer* with colleagues Daniel Cole, Michael Heise, Susanah Mead, Elise Papke, and June Starr.

1. *KRAMER VS. KRAMER* (Columbia 1979).

2. *Holiday Winners and Losers: A Time for Fun, Diversion and a Few Tears*, TIME, Jan. 14, 1980, at 55.

3. *Id.*

he does not even know his child's grade in school. On the other side is Joanna Kramer, a Smithie and former employee of *Mademoiselle*, who has left the public sphere to devote herself to raising the couple's six year old son Billy. Overwhelmed by feelings of worthlessness so strong that she cannot continue parenting, Joanna leaves Ted and Billy to find herself. Ted learns to parent, Billy begins to thrive, and then fifteen months later Joanna returns, seeking not forgiveness but custody. *Kramer vs. Kramer* becomes a battle over Billy, but even more fundamentally it becomes a battle over fathering and mothering, over how men and women should lead their lives, and over the configuration of gender in contemporary American society.

Law provides both the weaponry and battlefield. Contrary to recent changes, the movie insists that gender is the primary factor in child custody determinations at the time of divorce. Having established gender as the key, the movie then goes to court, where proceedings are seen from a distinctly male perspective. Finally, and most intriguing, at the end of the movie, it turns against law and allows the two major characters to reach their gendered peace literally, in spite of the law. In these ways and others, law in *Kramer vs. Kramer* is a central player in a dramatic attempt to reach closure in an era of agitated gender politics. The producers use their own variety of law to shape their proposal for how the sexes should get along, in both the family and society in general.

I. Legal Inaccuracies With a Purpose

When scholars contemplate law and legal proceedings in popular culture, there is perhaps an inevitable tendency to turn to considerations of accuracy. Edward Bennett Williams, the famous trial lawyer, complained before his death that Perry Mason and a bevy of other fictional lawyers from prime-time television of the 1950s and 1960s created unrealistic expectations.⁴ With Mason always dramatically exonerating his innocent client and identifying the true perpetrator, clients, jurors, and others, were invariably disappointed when real-life criminal defense lawyers proved much less resourceful. Even the very best of criminal defense lawyers, Williams noted, are lucky to win acquittals in the majority of their cases.⁵ More specifically, Charles and Mariann Pezella Winick have added that, although cross-examination is important in criminal trials, actual witnesses rarely break down on the stand and confess the way they often do in fic-

4. Edward Bennett Williams, *The High Cost of Television's Courtroom*, 3 TELEVISION Q. 11, 11-16 (1964).

5. *Id.*

tional television trials.⁶ Taking this variety of cultural criticism even one step further, Jon L. Breen argues explicitly that the "accuracy" of a trial in popular culture is a crucial issue in critical evaluation.⁷ Breen lists and thereby denigrates three especially inaccurate courtroom novels: William Ard's *Hell Is a City*, Harold R. Daniels' *The Accused*, and Barbara Frost's *Innocent Bystander*.⁸

Both at the time of its release and more recently, *Kramer vs. Kramer* has itself prompted this type of criticism. After previously reviewing the movie and reporting on the popular hubbub it generated, *Time* doubled back to explore the child custody questions the movie addresses. Much of *Kramer vs. Kramer*, *Time* concluded, was "legally out of date."⁹ More recently, law professors Paul Bergman and Michael Asimow, in their book-length catalogue of courtroom movies, devoted four pages to *Kramer vs. Kramer*, over half of which is determined to point out the movie's legal errors.¹⁰

Criticism of this sort does no harm, and there is indeed something to be gained from alerting the citizenry to differences between the law and legal proceedings in popular culture and what might be understood as "real life." However, those who are determined to apply a legal truth test to popular culture, or to *Kramer vs. Kramer* in particular, should also realize that the "legal inaccuracies" are not mistakes, much less attempts to dupe the lay public. Critics with a bent for noting "legal inaccuracies" should dismount the high horse of expertise and recognize that cultural conventions and prescriptions, much more than faithfulness to the law, shape works of popular culture.

In *Kramer vs. Kramer*, as previously suggested, law provides the movie's gender battlefield, and in particular, the producers employ a resurrected and misrepresented maternal preference standard. If one reviews the history of American child custody standards, one is struck by the amazing shifts with regard to gender. In the early Republic, when divorce was rare by modern standards and sometimes granted by legislatures rather than courts, child custody almost always went to the father. This paternal preference began to disappear in the mid-nineteenth century, and in the decades

6. Charles Winick & Mariann Pezella Winick, *Courtroom Drama on Television*, J. COMM. 67, 73 (1974).

7. See generally JON L. BREEN, *NOVEL VERDICTS: A GUIDE TO COURTROOM FICTION* (1984).

8. *Id.* at x (denigrating WILLIAM ARD, *HELL IS A CITY* (1955), HAROLD R. DANIELS, *THE ACCUSED* (1958), and BARBARA FROST, *THE INNOCENT BYSTANDER* (1955)).

9. *Custody: Kramer vs. Reality*, *TIME*, Feb. 4, 1980, at 77.

10. PAUL BERGMAN & MICHAEL ASIMOW, *REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES* 279-83 (1996).

after the Civil War the “tender years” approach settled into place. Reflecting a Victorian sense that the mother was the true nurturer and care giver for children, the “tender years” doctrine resulted in custody awards to the mother whenever there was a contest over young children. Then, in still another striking shift in the second half of the twentieth century, this doctrine also gave way. Due to legal arguments couched with reference to state and federal equal protection standards, and more generally to shifting gender norms, courts moved to a gender-neutral standard and attempted to determine which custodial option would be in the “best interests of the child.”¹¹ A few states seemed stalled in the Victorian Age, but Justice Brennan’s stern words in an opinion invalidating an Alabama statute that made only husbands and not wives susceptible to alimony, should have provided pause:

Legislative classifications that distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the “proper place” of women and their need for special protection Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the State’s compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.¹²

By 1979, the year in which *Kramer vs. Kramer* was released, New York (the state where the movie is set) had abandoned maternal preference and moved to a “best interests” test,¹³ but you would never guess it from the movie. Attorney Shaughnessy, played by veteran actor Howard Duff, warns Ted Kramer that courts favor mothers in custody battles over young children. The task, Shaughnessy is certain, is to prove Joanna is an unfit mother. Shaughnessy also apparently overlooks the fact that the parties had already divorced (admittedly off-screen), and Ted had custody, so the issue was not custody per se but rather custody modification. Even assuming a maternal preference rule, modification hearings place great weight on maintaining child care continuity.¹⁴ Real law notwithstanding, fictional Judge Atkins sees things the way attorney Shaughnessy does. Atkins’ award of custody to Joanna Kramer relies almost completely on the “tender years”

11. HOMER HARRISON CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 786-89, 799-800 (2d ed. 1988). For an excellent treatment of the dramatic changes in child custody standards during just the nineteenth century, see MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 234-68, 281-85 (1985).

12. *Orr v. Orr*, 440 U.S. 268, 283 (1979).

13. *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285 (N.Y. Fam. Ct. 1973).

14. JUDITH AREEN, *CASES AND MATERIALS ON FAMILY LAW* 652 (3d ed. 1992).

approach. Atkins, in Shaughnessy's words, "went for motherhood right down the line."

An appeal is certainly called for. Without a doubt, this is a misunderstanding of the law and grounds to overrule, and indeed, Ted Kramer does discuss the possibility of an appeal with his attorney. However, it is more important to recognize why the producers chose to present the law as they did. What is the purpose of the "legal inaccuracy" in the context of a popular Hollywood movie, as opposed to an actual New York court of law?

In a word, gender. The incorrect and outdated standard enables the producer to underscore that the movie is about gender and gender roles. The viewing public was much less likely to be interested in a tedious review of assets, earning capabilities, and family history. The public did not want, at least in a movie, to hear lengthy child psychology testimony, perhaps from both sides, *and* from a court-appointed expert. The viewers were not likely to be engaged by a gender-neutral consideration of "best interests." The producers chose their law to enhance the drama and, in particular, to underscore both a struggle between the sexes and a struggle over how the sexes should understand their roles.

II. The Male Gaze at Legal Process

In the single most cited and influential essay in feminist film studies, the scholar Laura Mulvey has argued that popular movies incorporate the male "gaze."¹⁵ The gaze she asserts, turns women on the screen into voyeuristic delights: body parts and human objects ideal for ogling.¹⁶ Watching facilitates control of the female "other" who challenges patriarchal narcissism.¹⁷ In *Kramer vs. Kramer* itself, a concrete example occurs. With Joanna departed for purposes of self-reclamation and Ted struggling to parent, Ted spends the night with Phyllis Bernard, a business associate played by JoBeth Williams. Headed for the bathroom in her birthday suit, Bernard awkwardly encounters young Billy, who at least has the good sense to make nothing much of the encounter. Meanwhile, viewers are given a long and longing look at Bernard's tush, exactly the kind of male gazing at the woman as object that Mulvey criticizes.

Mulvey's important essay invites extensions and analogies. Margaret Russell, a provocative film critic, who doubles as a law professor at Santa

15. See LAURA MULVEY, *Visual Pleasure and Narrative Cinema*, in VISUAL AND OTHER PLEASURES 14, 14-26 (1980) [hereinafter MULVEY, *Visual Pleasure*]. Mulvey reflects on this widely cited article in LAURA MULVEY, *Afterthoughts on 'Visual Pleasure and Narrative Cinema' Inspired by King Vidor's *Duel in the Sun* (1946)*, in VISUAL AND OTHER PLEASURES 29 (1980).

16. MULVEY, *Visual Pleasure*, *supra* note 15, at 25.

17. *Id.*

Clara University, has derived the phrase "dominant gaze" from Mulvey's "male gaze."¹⁸ Russell argues that there is a tendency in American popular cinema to objectify and trivialize the racial identity and experiences of people of color, even when it purports to represent them. "Like Mulvey's male gaze, the dominant gaze subtly invites the viewer to empathize with its viewpoint as natural, universal, and beyond challenge; it marginalizes other perspectives to bolster its own legitimacy in defining narratives and images."¹⁹ The perspective of the popular film, in other words, can effectively project bias as truth.

Kramer vs. Kramer powerfully employs the perspective of the enlightened male in virtually all of its crucial legal scenes. That is, the gaze at legal process is almost always biased, and viewers are invited to adopt the male perspective. This tendency is all the more striking since Meryl Streep, herself a declared feminist, insisted on enlarging the Joanna Kramer character and in making her courtroom statements more intelligent.²⁰ Surely, the movie rebukes fathers who pay too little attention to raising their children, but the movie also consistently sides with the beleaguered father attempting to cope with the alleged gender tilt of the legal process.

To be more concrete, in the previously noted intake interview, attorney Shaughnessy warns Ted that the court will favor his ex-wife in the custody battle. We resent the news. Ted, after all, has struggled before our eyes to learn how to parent. He has mastered the making of French toast; he has learned to tuck his boy in at night and to get him to school on time; he has even raced desperately with Billy to the emergency room after he injured himself in a playground fall. Where was Joanna through all of this? Off-screen, presumably pursuing her quest for self-discovery. Surely, we are invited to conclude, there is something wrong with a legal process that would fail to prioritize Ted's custody claims.

Later, when the Kramers do in fact have their day in court, we are also carried to Ted's side in the proceedings. We find it unfair when Joanna's attorney asks Ted on the stand about his move from one advertising agency to another for lower pay. We are angered by the suggestion that it was Ted's negligence that caused Billy's playground fall. But somehow, it does not seem quite as bad when Shaughnessy questions Joanna about her sexual liaisons since the time of her divorce from Ted. Indeed, how remarkably sympathetic Ted's gaze at the legal proceedings seems. With Joanna wilting on the stand from a brutal cross-examination, Ted shows no vindictive

18. Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 *LEGAL STUD. F.* 243, 244 (1991).

19. *Id.*

20. Jack Kroll, *A Star for the '80s*, *NEWSWEEK*, Jan. 7, 1980, at 52, 54.

pleasure. With Joanna struggling with the question "Were you a failure at the most important personal relationship of your life?" Ted establishes eye contact and supportively shakes his head no.

Even after the legal proceedings conclude with a decision adverse to Ted, we continue to reflect on developments from Ted's perspective. When Ted asks Shaughnessy about an appeal, Shaughnessy warns that it would be necessary to put little Billy on the stand. Ted realizes how destructive this would be. The viewer shares his appraisal of the legal process' twisted ways and seconds his decision to back off for Billy's sake. Ted continues to win our sympathy.

"Legal inaccuracies" are of course rife in all of these scenes and proceedings. The questions in court about Joanna's liaisons would be irrelevant, and it is balderdash to present an ex-spouse supportively signaling the other ex-spouse in the midst of cross-examination in a hostile custody fight. What unmitigated ignorance and even malpractice it would be for a divorce lawyer (or any lawyer for that matter) to suggest that somebody would have to take the stand on appeal. But as noted earlier, with regard to the law as opposed to legal process, "legal accuracy" at best rides shotgun to the conventions of the popular film and to gender-related ideology. We see legal developments in *Kramer vs. Kramer* almost exclusively as Ted sees them. We are invited to accept his perspective. We gaze on what happens in the lawyer's office and in the courtroom from a masculine perch.

III. Gender Peace to Spite the Law

While the two Kramers are clearly battling one another over young Billy, the former spouses do not have a monopoly on antagonistic relationships in *Kramer vs. Kramer*. Another antagonist emerges and stands in opposition to Ted, Joanna, and Billy. This antagonist is the law itself, and in the end the characters reject law, its styles, and its determinations on the way to achieving their final peace.

The chief personification and symbolic representation of the law in *Kramer vs. Kramer* comes, not surprisingly, through the movie's lawyers and courtroom scenes. As viewers, we know best attorney Shaughnessy, Ted Kramer's lawyer, and we see him in an intake interview, hear Ted talk with him on the phone, and watch Ted meet with him in a bar after the court has ruled. In the initial interview, Shaughnessy asks Ted for \$15,000 up front, warns him he will "play rough," and also suggests composing a pro and con list regarding the looming custody fight. Joanna Kramer's lawyer appears less frequently. Joanna not only finds herself off-screen but also presumably meets with her attorney there. Neither lawyer is a major char-

acter in the movie, but the lawyers do nevertheless occupy important roles in the plot and denouement.

The lawyers are most prominent in the movie's courtroom scenes, an almost ubiquitous American cultural convention, especially capable of offering Americans meaning.²¹ The courthouse is the August New York State Supreme Court Building. We first see it in a long establishing shot, and then the camera magically elevates us through the grand atrium to a classic high-windowed chamber at the top. This is a place in which one might expect dignity and honor to reign, a place in which fairness and justice will triumph.

We have, of course, been set up. The custody modification hearing brutalizes and demeans everyone involved. As noted earlier, Shaughnessy so aggressively cross-examines Joanna on the stand that even Ted is concerned with her plight. Joanna's lawyer, for his part, is equally hard on Ted. He forces Ted to admit that he lost his original job and had to take another one at lesser pay; the lawyer also effectively suggests that Ted's carelessness caused Billy's playground accident. At each turn, the lawyers are sarcastic, unrelenting, and intimidating. Judge Atkins, still another personification of the law, presides over the hearing and fails miserably to restrain misrepresentations of the Kramers' lives.

As noted earlier, most viewers would continue to side with Ted if forced to continue choosing sides throughout this cinematic ordeal. One can also side with Joanna, Billy, and everyone else against the law. On one level, the movie's writers and producers are merely taking advantage of the well-established negative stereotypes of divorce lawyers.²² On a more general level, there is also the hostility toward lawyers that has existed since the founding of the Republic and seems to have achieved a new crescendo in recent years.²³ On still a more general level, we have hostility to the law, as symbolized by various legal characters, proceedings, and determinations.

Kramer vs. Kramer is not the only movie or television program to cast law as an antagonist or even as a villain. Perhaps the most pronounced example is *And Justice for All*,²⁴ a film released in the same year as *Kramer vs. Kramer*. *And Justice for All* ends with an attorney, played by Al Pacino, screaming uncontrollably in the courtroom that the legal system is a trav-

21. See David Ray Papke, *The Courtroom Trial as American Cultural Convention*, in *THE LAWYER AND POPULAR CULTURE: PROCEEDINGS OF A CONFERENCE* 103 (David L. Gunn ed., 1993).

22. See Stephen Labaton, *Are Divorce Lawyers Really the Sleaziest?*, N.Y. TIMES, Sept. 5, 1993, at E5.

23. For an interesting analysis of popular hostility to lawyers, see Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379 (1987).

24. *AND JUSTICE FOR ALL* (Columbia 1979).

esty. Other films more subtly criticize lawyers, courtrooms, and the law. For example, in John Ford's *Young Mr. Lincoln*,²⁵ we enjoy watching the Lincoln character begin to use a law book to shape a technical legal argument at trial, only to back off.²⁶ We also approve of Frank Galvin, the attorney played by Paul Newman in Sidney Lumet's *The Verdict*,²⁷ when he counters a string of adverse procedural rulings and convinces the jury that it must disregard the law in order to get to justice.²⁸ In the remake of *Cape Fear*,²⁹ we encounter the fictional lawyer Sam Bowden, played by Nick Nolte. Having earlier played the lawyer game too eagerly, Bowden, to some extent "deserves" to be harassed by the psychopathic ex-con played by Robert DeNiro.³⁰ Indeed, even in the *Perry Mason* shows of the 1950s and early 1960s, Mason not only frees his client and identifies the truly guilty party but also humiliates the chief representative of the legal system, prosecutor Hamilton "Ham" Burger. As we watch Burger writhing in defeat at the end of each episode, we delight in the defeat of law's technicalities and narrow-mindedness.³¹

Kramer vs. Kramer in its own way also manifests this "anti-legal" sentiment in American popular culture. The lawyers are wretchedly nasty. The laws are biased, and so is the judge. When Ted and Joanna decide what to do about their son Billy, and make peace between themselves, they do so despite the law, and in part to spite the law.

Conclusion

Law has a crucial role in *Kramer vs. Kramer*, particularly with reference to gender. The legal "standards" incorporated into the film emphasize gender. Lawyers and legal proceedings are viewed through most of the movie from the perspective of a male trying admirably to parent. In the end the chief players react against law and its judgments as they settle, not only on Billy's custody, but also on their own gender identities.

25. *YOUNG MR. LINCOLN* (Twentieth Century Fox 1939).

26. Norman Rosenberg, *Young Mr. Lincoln: The Lawyer As Super-Hero*, 15 *LEGAL STUD. F.* 215, 222 (1991).

27. *THE VERDICT* (Twentieth Century Fox 1982).

28. Rosenberg compares the Lincoln character with Galvin. Rosenberg, *supra* note 26, at 223. For a more general treatment of *The Verdict* from a legal perspective, see THOMAS J. HARRIS, *COURTROOM'S FINEST HOUR IN AMERICAN CINEMA* 150-67 (1987).

29. *CAPE FEAR* (Universal 1991).

30. David Morgan, *Nowhere to Hide: A Lawyer Faces His Nemesis in Cape Fear*, *A.B.A. J.*, Feb. 1992, at 50, 51-53.

31. See David Ray Papke, *Erle Stanley Gardner and His Amazing Perry Mason Machine*, *JURIS DR.*, Aug.-Sept. 1973, at 26, 26-29.

And just what are those identities? Ted Kramer has achieved some balance in his life; he is still working in the Madison Avenue sector of the public sphere, but he is also caring and attentive to his son. Joanna Kramer is also now at work, and even earning more than Ted. However, in refusing to accept the custody that the court has awarded and that she so desperately wanted, Joanna has also shown the willingness to sacrifice what we have traditionally expected from mothers. She has put the welfare of her child before her own. "How do I look?" Joanna asks Ted before going up the elevator to tell Billy he can stay with Ted. "You look terrific," Ted declares, and we agree, as the elevator doors close.

With this, we exit the cinema or push rewind on our VCR. *Kramer vs. Kramer* does not merely "reflect" the agitated gender politics of its era. It is not simply "about" women's liberation or fathers' rights. Like many successful pieces of popular culture, *Kramer vs. Kramer* disguises, diffuses, and resolves the complex and contradictory situations in the historical conjuncture that spawned it. *Kramer vs. Kramer* attempts to model modern parenting, including gender roles, using a legal proceeding and variety of law that is imagined, but that also proposes a modern variety of gender peace.